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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 31.

EDWARD J. GUNNING, *Petitioner,*

vs.

GERTRUDE L. COOLEY.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF RESPONDENT.

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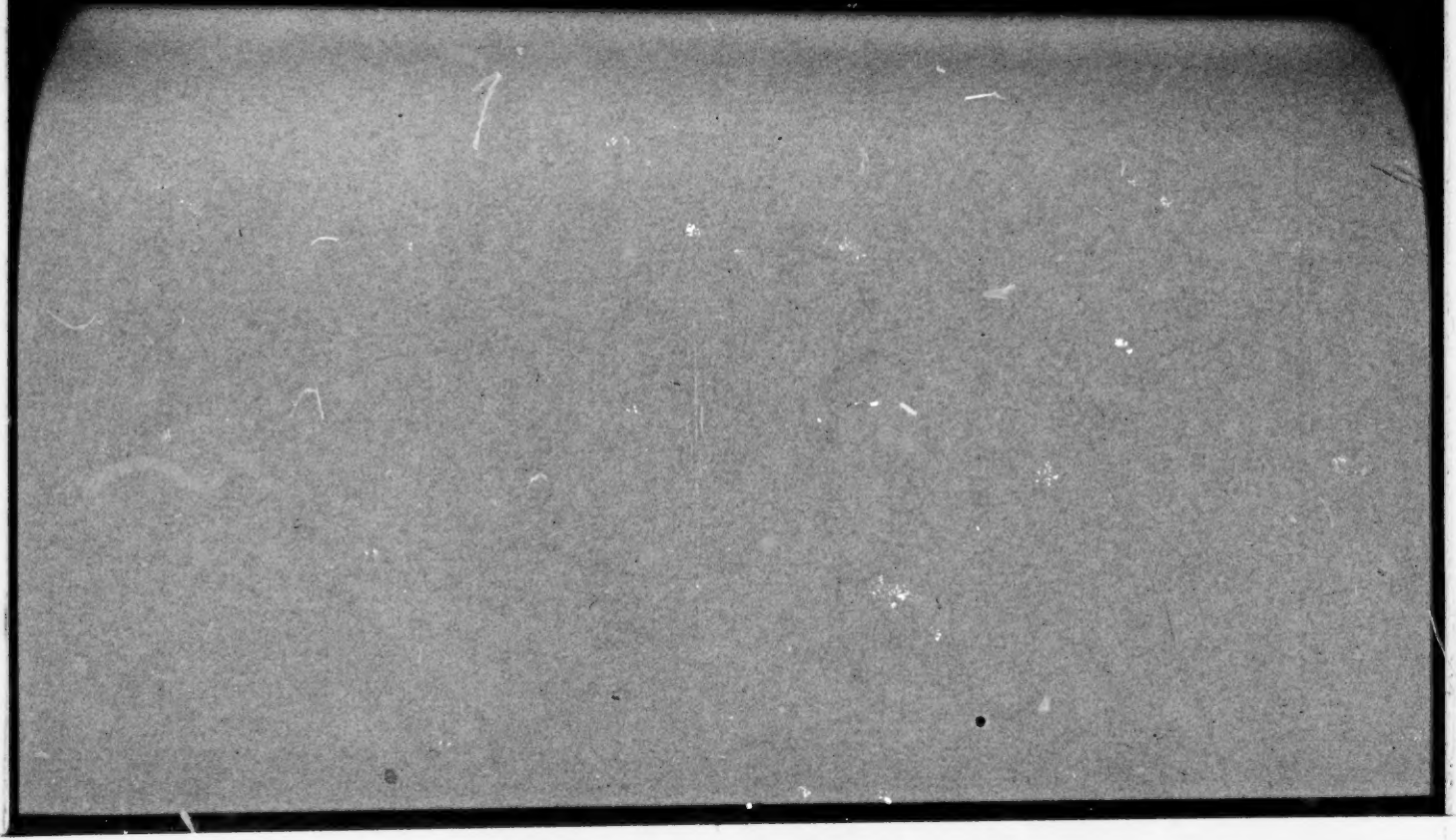

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BRIEF ON BEHALF OF RESPONDENT.

Respondent was the plaintiff and the petitioner was the defendant in the trial court, and they will be referred to as such in this brief.

The action was to recover damages for personal injuries which the plaintiff alleged she sustained by reason of the negligent medical treatment rendered her by the defendant. The case was submitted to the

jury upon the conflicting testimony, after a comprehensive and correct charge to the jury by the trial court. (R. 61-72) The jury returned a verdict in favor of the plaintiff. A motion for a new trial, which challenged the sufficiency of the evidence as well as alleged newly discovered evidence, was duly argued and overruled, the trial justice filing a written memorandum opinion (R. 5-6) effectively disposing of defendant's contentions.

Upon appeal, the judgment was affirmed by the Court of Appeals of the District of Columbia. The majority opinion written by the Chief Justice (R. 73-79) contains a careful and well considered review of the salient testimony and of the authorities, disposing upon reason and authority of the various contentions made by the defendant at that time and now repeated in his brief filed in this court.

It is true that one of the Justices of the Court of Appeals who concurred in the opinion affirming the judgment, voiced his personal disapproval of the rule of law, long established, whereby issues of fact, when fairly raised, are to be submitted to the jury, and it is also true that one of the Justices of the Court of Appeals dissented from the judgment and asserted that there was no basis for the verdict. A reference to very important testimony apparently not fully considered by the dissenting Justice will be referred to in this brief under the proper assignment.

With due deference to the several individual opinions of the Justices of the Court of Appeals and to the profession of medicine, it is respectfully submitted that a careful reading of all of the testimony in this case will disclose a fact that was apparent to the jury and trial justice who heard and observed the witnesses;

namely, that the defendant failed to exercise that reasonable degree of care which a physician, under the circumstances, should have exercised, and that by his reckless disregard of professional duty he perpetrated a cruel and painful injury to the plaintiff that, in the language of the trial justice, "is incurable." (R. 6)

STATEMENT OF THE CASE.

Plaintiff's proof tended to show that the defendant negligently injected an acid instead of mineral oil into her ears, as a result of which her right ear-drum was practically all destroyed and her left ear-drum partly destroyed, with consequent permanent impairment of hearing.

Defendant in his plea admitted that he had inserted a liquid in her ear, but claimed it was a pure mineral oil. One of plaintiff's witnesses, a lawyer whom she had consulted in September or October, 1925, testified that defendant telephoned him in reply to a letter presenting claim on behalf of plaintiff and denied that he had ever treated her ears or inserted any solution at all in the ear (Record 31), whereas defendant on the witness stand testified that he did not recall exactly the conversation with the lawyer but remembered that he did have a conversation. (R. 54.)

The record shows without contradiction that, although the physician had twelve or thirteen bottles on his medicine cabinet, he used the same dropper for all of his liquids (R. 55-6), and all of the bottles were similar in appearance. (R. 19.)

Defendant on his own behalf intimated that on the occasion of her visit to his office plaintiff had suffered an attack of a rare disease known as Menieré disease,

but none of the medical experts produced on his behalf or otherwise, expressed the opinion that she had Menieré's disease. The medical testimony also established, without contradiction, that Menieré's disease is a disease of the internal ear (R. 24), whereas the injury to the plaintiff was to the middle ear. (R. 27, 36.)

Plaintiff proved by numerous witnesses that her ears before the accident were normal and that she never had any infection or disease of the ear or deafness. (R. 12-18.)

It was conceded by all of the medical experts that the destruction of the ear-drum, if it did result from disease of any kind, would only so result because of infection, which would form an abscess in the ear, that on rupture would cause a perforation of the ear-drum, followed by discharge of pus. The history of plaintiff from childhood showed that she never had an infected, diseased, abscessed or discharging ear (R. 16-17). The plaintiff's narration of what happened when the acid was injected (R. 18-19) is remarkably like the description of sensations predicted by the medical experts from such an experience. (R. 24.)

Plaintiff was home in bed from the Wednesday evening of the occurrence, October 25, 1922, until the following Friday, October 27, 1922, and that evening, after efforts failed to have the defendant come to see her and give her treatment (R. 16) she went under treatment of Dr. Patten, an ear specialist (R. 15, 20) and was treated by Dr. Patten every day for nearly two months and then three days a week and later twice a week, and Dr. Patten continued to treat her until October, 1926, for a continuance period of four years (R. 20) until he went away. It was conceded by coun-

sel for the defendant that it was impossible to produce Dr. Patten as a witness at the trial (R. 29). He had suffered a nervous breakdown and was then in a sanitarium.

Dr. Patten's qualifications as an ear specialist were recognized by Dr. Gunning, the defendant, because defendant testified it was he who had referred plaintiff to Dr. Patten (R. 54-56) but in this as in other details, he was overwhelmingly contradicted by the testimony of the plaintiff and other witnesses. (R. 16, 17, 19.)

Defendant also pleaded the Statute of Limitations, contending that his treatment was given October 20, 1922, the action having been filed October 22, 1925, but the plaintiff proved by numerous witnesses that the negligent treatment was given October 23, 1922, the date being especially remembered by plaintiff's witness Brill (R. 12) whose birthday, was the day she had accompanied plaintiff on the occasion of her first treatment, Saturday, October 21, 1922.

The trial Court in its charge to the jury specifically instructed the jury on both the issue as to negligence and as to the Statute of Limitations. (R. 61-72.)

ARGUMENT.

I.

The Rejection of the Records and Memoranda of the Defendant and Witness Allen was Proper.

On pages 50 and 51 of the record the proceedings are detailed when the trial court excluded a memorandum made by defendant on a fly leaf of a Federal Narcotic record book, October 13, 1922, part of which record the Doctor himself admitted, he could not read. Counsel for defendant contended it was a record made in the regular course of his business but the witness himself on page 52 of the record admitted that it was not, but "Just in exceptional cases concerning exceptional cases," or in other words in certain instances.

This alleged record was plainly not a regular record made in the regular course of his business but, as the trial court stated, a self serving declaration not an account book and not an entry in the usual course of business (R. 51) and certainly no part of the *res gestae*. Moreover every readable statement it contained was testified to orally by the witness.

The alleged record dated October 20, 1922, made by the defendant on a piece of paper was equally inadmissible as not coming under any exception to the hearsay rule and not being used to refresh the recollection of the witness who testified that he remembered its contents very well without the memorandum (R. 52) and as a matter of fact testified orally to every alleged fact contained in the written memorandum including not only what he claimed to have found on his examination on that date but also as to the date on which the examinations occurred.

The trial court also properly excluded the history

card and copy of report made by Dr. Allen to defendant following his examination of the patient November 24, 1925. Doctor Allen testified in detail as to every finding contained in the report, in his oral testimony and did not require the memorandum to refresh his recollection, nor was the production of the history card and report called for by the plaintiff. The correctness of the trial court's ruling in this matter will clearly appear by an examination of pages 46 and 47 of the record.

The cases cited by defendant in support of his contention that the record and memoranda of the defendant and the witness Allen should have been admitted in evidence have no direct application to the case at bar.

The records and the memoranda offered in this case were manifestly not books of account kept in the ordinary course of business, but were entries merely of a casual transaction not in the regular course of business of the party, as admitted by the witness himself, and therefore of no evidential value in this case.

The trial court examined the narcotic book upon the fly leaf of which the solitary entry in this case appears, as well as the paper purporting to be the defendant's report of his interview and examination of the plaintiff on October 20th, and the record shows the trial court's comment on the inadmissibilty of said records at the time. (R. 50-52.)

It has been held that a trial court has discretion regarding the admission of such papers where there is any question of their regularity or suspicion as to their accuracy.

The case of Burson vs. Vogel, 29 App. D. C. 388, 392, cited by defendant involved entries in a private

diary kept by a party to the cause for 50 years regularly, containing dates and memorandum of work done on a complicated invention and this court said that such a record could be used by the witness to refresh his recollection on the details.

In Fennerstein's Champagne, 3 Wall. 145, 149, also cited, the question at issue was the market value of wines in France and it was held proper to admit letters from various dealers written in the course of their duties as bearing on the question of market value.

In Cayton vs. English, 56 W. L. R. 6, it was held merely that a medical report made by the defendant to the physician who had referred the plaintiff to him for treatment was part of the transaction or *res gestae*.

The cases of Bean vs. Lambert, and Kamm vs. Reese, which incidentally have never been cited in any later federal cases, involved actions of debt.

In the Encyclopaedia of Evidence, Volume 2, Page 626, the principle here applicable is clearly stated as follows:

> "The book is not admissible where the entry is but a casual transaction, not in the regular course of business of the party, nor where there is entered but a single transaction."

Regardless of conflicts in various state courts, the law in Maryland, adopted by this jurisdiction is clearly set forth in Romer vs. Jaecksch, 39 Md. 585, 589, as follows:

> "In this state the rule of the common law has not been departed from, and it has been held to apply only to entries made by a clerk or other disinterested party; here the entries in question are those made by the deceased parties, a party

> to the transaction, having a direct interest in the subject matter, and therefore, not within the rule above stated."

This principle was discussed and affirmed in the recent case of Cohen vs. Bogatzky, 149 Md. 134, 139.

In the case at bar these memoranda were offered both as a record in the regular course of the doctor's practice and as part of the *res gestae* (R. 52) and the memorandum dated October 20th, 1922, purporting to be the history taken by him on that date, was offered as a record made at the time in the course of the doctor's practice, as a part of the *res gestae* and as admissions on the part of the plaintiff. (R. 52.)

In neither case was the record or memoranda of defendant offered as corroborative evidence of the date on which he made his examinations with reference to the issue as to the statute of limitations, and he cannot now urge their admissibility on that ground as he seeks to do on page 13 of his brief.

In re estate of Fulton, 178 Pa. 78, 35 L. R. A. 133, 134, which was an action involving the admissibility of a physician's book, the court said:—

> "But there is an insuperable objection in the present case, that the book is not one of entries in the regular course of business. It is a separate book, containing no charges, except against the decedent."

In Richardson vs. Emery, 23 N. H. 220, 223, the court said:

> "The ruling of the court in this case rejecting the book was correct. There is no principle on which such extremely loose papers as those of-

fered by the plaintiff are admissible in evidence, as a book of accounts. They do not possess that intrinsic evidence of their truth, without which the admission of account books is extremely dangerous to the cause of justice. * * * It would be much easier to manufacture a book containing the plaintiff's statement of a single transaction than a regular account book containing the minutes of his business from day to day.'

In Stuckslager vs. Neel, 123 Pa. 53, 60-61, the court said:

"The rule is perfectly familiar, and is illustrated in the case of Shoemaker vs. Kellogg, 11 Pa. 310, in which we held that books of original entry are not evidence of the casual sale of an article not in the course of the party's business, and of which it is usual to take other proof or evidence of sale. * * *

The person who made the entry was himself a witness in the cause and testified * * *. That testimony was competent and was primary. Its importance depended upon its character and the credibility of the witness. But its competency does not depend in the least degree upon the fact that he made a written entry or memorandum of the transaction at the time. He could testify directly and in person to any fact he entered on the books and that testimony would be the original, primary and therefore only legal evidence of the fact in question." (R. 61.)

The following additional authorities are cited by the Chief Justice of the Court of Appeals in his opinion in the pending case.

Vicksburg & Meridian R. R. vs. O'Brien, 119 U. S. 99.

Sechrist vs. Atkinson, 31 App. D. C. 1.

Gurley vs. MacLennan, 17 App. D. C. 170.
Rudd vs. Buxton, 41 App. D. C. 35, 38.

II.

The Objections to the Hypothetical Question Were Properly Overruled.

The hypothetical question which the court permitted Dr. Gill to answer begins on page 25 of the record and was framed so that it specifically excluded what the patient had told him, and was based solely upon his own examination of her condition, assuming the truth of the facts stated in the hypothetical question.

The effort of defendant to draw hair-splitting distinctions in the language used in the question is futile as the question substantially conveyed to the witness an assumption of facts complete and supported by the testimony.

Every doctor who testified conceded that if disease, and not a tissue destroying acid, caused the perforated ear drums, the perforation would have resulted from an abscess that formed as a result of the disease or infection, and that on rupturing, perforated the ear drum. In such case the abscess would usually be attended with pain and always followed by the discharge of pus (R. 23); so that no matter what the nature of the disease, whether of childhood or later age, and whether measles, scarlet fever, catarrh, syphilis, tuberculosis, infected teeth, nose or throat, or otherwise, the ear drum perforation, if from disease, would be preceded by symptoms localized in the ear, and if severe enough an abscess would form, which on breaking would discharge pus, and leave the ear drum perforated. (R. 29.)

The testimony offered on behalf of the plaintiff es-

tablished beyond question that she never suffered from any abscess, pain, or discharge from the ear, and the jury had the right to infer from this testimony that her ear drums had not been perforated by infection or disease prior to the time Dr. Gunning treated her.

The hypothetical question assumed that at no time did she have any abscesses of the ear or discharge of the ear that resulted in the discharge of pus. Defendant contends on page 24 of his brief that Dr. Gill's testimony limited the diseases which affected the ear drums and would cause a discharge in the ear, to the acute diseases of childhood. Dr. Gill also testified without such limitation that, "In the event that a disease should cause the destruction of the ear drums it would usually be followed by a discharge from the ear and pain before the ear rupture. (R. 23.)

All of the other expert witnesses corroborated Dr. Gill to the effect that whenever the perforated ear drum resulted from disease, it would be because the infection localized in the ear drums sufficiently to form an abscess. (R. 35.)

To the objection that the witness took into consideration the examination he made in answering the question, this he had a right to do, inasmuch as he detailed to the jury what he found on that examination in prefacing his answer to the hypothetical question.

The final objection to the answer, is that it was a guess on the part of the witness, because on cross-examination he testified that when he first examined the planitiff he did not reach a conclusion or diagnosis at that time as to the cause of her trouble, and that he had not yet reached a conclusion in his own mind as to the cause of her trouble. (R. 28.) As the trial court stated in overruling this objection, the witness con-

veyed the meaning that he had not reached any conclusion as to the cause of her condition, *solely from his examination;* but his opinion, in answer to the hypothetical question, was based *not merely upon his examination,* but also upon the facts that he was asked to assume in that question, the truth of which facts it was not for him to know or determine. (R. 30.)

The language of the trial court on this point is as follows:

> The Court: I think the motion will have to be overruled. I followed the doctor's testimony pretty closely and my view of this testimony was that he did not, in answering the hypothetical question, add to it any facts that he was not asked to assume in it. With respect to the last stated ground, not having formed any conclusions in his own mind as to the cause, I understand his testimony to be that he had not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question which was an opinion based entirely upon facts that he was asked to assume in that question. For that reason I overrule the motion, to which ruling the defendant duly noted an exception.

The specific objections now made to the hypothetical question were not raised in the trial court, but merely the general objections that the question was irrelevant and immaterial. (R. 26.)

The refusal of the court to strike out the answer after the cross-examination was also proper, because it was apparent that the doctor did not guess and as the trial court said (R. 30) his answer to Mr. Gatley was merely to the effect that he had no personal knowledge as to the real cause, but was merely testifying as an expert upon assumed facts.

The weight of his testimony and its credibility was for the jury.

In the language of the majority opinion of the Court of Appeals, in considering this assignment of error, the Court of Appeals said (Rec. 77-78)

> "Other assignments of error are presented by Appellant, among them the charge that the lower court erred in permitting plaintiff's expert witness to answer the hypothetical question put to him by plaintiff's counsel. We find no error in this ruling, for the question called for an answer based on both the personal knowledge of the witness, acquired by his examination of plaintiff, and upon assumptions such as were supported by evidence already introduced in behalf of plaintiff."

III.

The Witness Smith was Properly Permitted to Impeach Doctor Allen.

The foundation for impeaching Doctor Allen was laid on his cross-examination (R. 34). He was asked on direct examination as to an examination he had made of plaintiff, and it was proper on cross-examination to bring out the details as to who were present when he made that examination and the circumstances under which he made it. This was not collateral but directly a part of the same examination about which he testified in chief. The foundation to impeach him was laid without objection. (R. 34.) He contradicted by his testimony what he was heard to say as part of his findings at the time he made the very examination he was testifying about.

The record shows that the trial court limited this impeachment and admitted the testimony of the wit-

ness Smith, not for the purpose of establishing the fact as to what condition her ear drums were in then, but merely for the purpose of contradicting Allen, and the testimony was only admitted for that purpose. (R. 58-9.)

IV.

The Court Did Not Err in Refusing Defendant's Instruction No. 3.

This instruction was fully and fairly covered by the Court in its general charge and the prayer itself was objectionable as an abstract statement and misleading in that it required the plaintiff to establish that she sustained all the injuries complained of in the declaration and not merely any of them, and did not limit the proof to the negligence charged in the declaration. The substance of this instruction was so thoroughly covered in the trial court's charge (R. 71) that defendant was not prejudiced by the denial of this prayer, and cannot complain of error in the denial of the instruction.

Presby vs. Thomas, 1 App. D. C. 171.

V.

The Court's Charge was Without Error.

The trial court plainly told the jury that there were two issues on the question of liability; one, the statute of limitations, and the other, negligence.

The trial court did not tell the jury that what the doctor put in her ear was the crux of the case, but merely that it was the crux of the case "on the question of alleged negligence" (R. 69), which was the sec-

ond issue for the jury to decide, the first being the plea of the statute of limitations.

Whether or not the doctor put a harmful solution in her ear was the crux of the case on the question of negligence, because that is the negligence that was charged.

The court carefully covered both issues in its charge. (R. 64, 65, 69.)

Every argument on the facts that appears in the defendant's brief was made to the jury, who by their verdict found the facts in favor of the plaintiff.

VI.

The Trial Court Properly Overruled the Motion for a Directed Verdict.

Under the evidence in this case the court properly submitted the issues to the jury to determine the facts.

It was, or should have been, peculiarly within the knowledge of defendant what he had put in plaintiff's ears. She could only know by the effect upon her. She testified that:

> "The very minute it went in the pain was horrible and I became dizzy, the room started going around and around. I held on to the arms of the chair and I told him: 'Something has happened, you can't realize what you have done.' He said: 'Oh, nothing is wrong, I assure you nothing is wrong.' I said: 'You can't realize what the noise is that I hear in my head and the dizziness and this room is going around.' He said: 'There is absolutely nothing wrong, let me put some in your left ear,' and he did, and as he did I felt the same sensation and I struck his arm away. It was terrible. No one knows what I went through. And he knew something had happened, he acted like

he was wild; he did not know what to do for me and I was begging him to do something for me and he just couldn't do a thing. He said it would be all right. I heard a roaring noise. I don't know whether it was cannon shots or gun shots or what, but the noises were terrible. I could not describe to anyone what they were. Immediately I became ill. I really lost control of my whole body. I didn't have any feeling and it seems that the doctor must have laid me on the table and that is about all I can remember except the noises in my head. I believe I do remember arriving home and seeing my mother that evening, but I could not tell you how I got there." (R. 19.)

On the other hand, the defendant testified that the liquid he inserted in her ears had a directly contrary effect on her; that it immediately relieved her. "She became partly composed so she could answer my questions. The oil relieved her pain and her dizziness." (R. 55.)

The evidence in the case not only established the negligence charged but fairly proved that her condition resulted from that negligence and not from any prior disease or infection. To determine these facts the jury was not required to conjecture or guess but had the evidence before it to find the facts.

The trial court expressly told the jury that their verdict must be based upon the evidence (R. 63, 66, 67) and granted defendant's prayer No. 4 to that effect (R. 68).

The cases cited by defendant have no application to the facts of this case. On the contrary there is a line of well considered cases against physicians which do apply, and which are to the effect that under circumstances such as are detailed in this case, the questions

of fact are for the jury, holding to the extent that expert testimony in such a case is merely advisory and in many instances not even required.

In Coffey vs. Tiffany (Mo. 1914) 182 S. W. 495, the action was against an oculist for blinding plaintiff's eye by administering the wrong medicine. In that case there was no expert testimony offered on behalf of the plaintiff, but the court held that it was not necessary where the claim was that he administered the wrong kind of medicine, and not that he erred in judgment; for in such case expert testimony as to the cause of an accident is merely advisory. It was further held that where a medicine produced blindness it was not necessary to show the particular nature of the medicine as that was peculiarly within the knowledge of the defendant upon whom the plaintiff relied as her physician.

In Wood vs. Vroman, 184 N. W. 520, 524, 198 N. W. 228, 229 (Mich. 1921) it was held in an action to recover damages for loss of an eye that it was for the jury to determine whether it was negligent to wipe pus from an ulcer on the patient's lower lid when there was an open sore on the eyeball.

It was also held that it was not required that the plaintiff prove malpractice to an absolute certainty, but merely to establish facts from which such an inference might fairly be drawn by the jury. In that case the defendant denied that he had found or opened an ulcer and insisted that the loss of the eye was due to an infection carried by particles of dust on the hands of the plaintiff and workmen in an effort to remove a piece of steel from his eye.

Marx vs. Scaultz, (Mich.) 175 N. W. 182, was an action against a druggist for causing death by putting

a mis-direction on the label prescribing a teaspoonful instead of three drops of a form of arsenic. The dose was taken November 30th and the patient did not die until February 7th following. It was held that a doctor's testimony as to the effect of arsenic, was sufficient evidence to submit the issue to the jury.

Loveland vs. Nelson, (Mich. 1926) 209 N. W. 835, was a case in which a wisdom tooth was extracted and it was claimed that lysol was put on the needle.

In James vs. Robertson (Utah 1911) 117 Pacific 1068, it was claimed that the doctor negligently permitted carbolic acid to come in contact with the cornea of the patient's eye after removing a cyst, and the defense was that no acid entered the eye, but the condition was due to other causes. It was held that the jury should decide the issue.

Grubbs vs. Elrod (Georgia 1922) 112 S. E. 379, held that the question of negligence was for the jury and to the same effect was Hunter vs. Burrough (Virginia) 96 S. E. 360.

In Eichholtz vs. Poe (Mo. 1920) 217 S. W. 282, where it was claimed that a doctor negligently caused a patient, while in a weak condition after the removal of a kidney, to have a tooth pulled, breaking his jaw bone and causing infection, it was claimed there was no proof of negligence or of casual connection between the act done and the injury suffered, but the court held that the issues were properly submitted to the jury, and that negligence in such case may be shown by circumstantial evidence and the inferences legitimately drawn from physical facts.

Laughlin vs. Christensen, 1 Fed. (2nd) 215, decided by the Federal Circuit Court of Appeals in 1924, was an action for damages for malpractice, the negligence

charged being that the surgeon left a gauze sponge in the abdominal cavity of a patient after an operation. The court held that it was proper to submit the issue of negligence to the jury and that in such a case expert testimony was not indispensable.

> "It is true that there is a large class of malpractice cases in which the question or matter under investigation is so intricate and abstruse, or so little understood, that ordinary jurors would in all probability, know nothing about the same, but must be guided by opinions of witnesses having special knowledge. In this class of cases the plaintiff fails to make a case for the jury in the absence of testimony of a properly qualified expert witness. * * *
>
> "Furthermore, it is not a universal rule, even when the alleged negligence of medical men is under consideration, that testimony by experts is indispensable."

In Vergeldt vs. Hartzell, 1 Fed. (2nd) 633, the action was against a dentist who in operating on plaintiff's teeth with an electric drill, permitted it to slip, lacerating her tongue and mouth. It was held that where the question in issue is not one of skill in treatment, or the performance of an operation, but of plain negligence and failure to use proper care, as to which a layman is as competent to judge as another physician or surgeon, it is not one which must be determined solely by the testimony of experts.

VII.

The Opinion and Judgment of the Court of Appeals.

Mr. Chief Justice Martin in delivering the majority opinion of the Court of Appeals in this case (R.

76) reviews the authorities of this court as well as of the Court of Appeals of the District of Columbia, which uniformly establish the principle that where there is uncertainity from the evidence as to the existence of negligence, the question is not one of law but of fact and to be settled by a jury; and this, whether the uncertainty arises from conflict in the testimony, or because the facts being disputed, fair minded men will honestly draw different conclusions from them, and it is only when but one reasonable view can be taken of the evidence and of its every intendment, and that view is utterly opposed to the plaintiff's right to recover, that the court is justified in withdrawing the issues of fact from the jury.

Richmond and Danville Railroad vs. Powers, 149 U. S. 43, 45.
Texas etc. Ry. Co. vs. Harvey, 228 U. S. 324; 57 L. Ed. 856.
Davidson Steamship Co. vs. U. S., 205 U. S. 192; 51 L. Ed. 767.
McDermott vs. Severe, 202 U. S. 604; 50 L. Ed. 1166.
Marande vs. Texas & Pac. R. R. Co., 184 U. S. 191; 46 L. Ed. 496.
Supreme Lodge K of P. vs. Beck, 181 U. S. 52; 45 L. Ed. 745.
Robertson vs. Wash. Ry. & Elec. Co., 279 Fed. 183.

It has never been contended by plaintiff that the issues should have been submitted to the jury because a scintilla of evidence was introduced, and the authorities cited by defendant to the effect that the scintilla rule is not the test, are not in point because the lower court in this case found substantial evidence in support of the plaintiff's claim, although there was a

sharp conflict of fact. Defendant admits in his brief that where there is any substantial conflict in testimony, the matter must be submitted to the jury, but contends that, in this case, there was no substantial conflict with respect to any substantial issue.

Let us, therefore, briefly consider a few of the outstanding substantial conflicts in testimony with respect to the substantial issues.

The defendant's own testimony as to what occurred was at variance with the testimony of nearly every other witness in the case, including his own expert. For example, he testified that when he inserted the liquid in plaintiff's ears it soothed and quieted her, whereas she testified that was when she experienced the terrible agony.

The defendant testified that he diagnosed the cause of the condition as "a Menieré's difficulty, which is a disturbance of the internal ear." (R. 54-55.) The fact that her eighth nerve (which is the nerve of hearing, and which transmits the sound) was normal proved that the inner ear was "perfectly allright," that there was no disease of the inner ear. (R. 27) This eliminates the theory of the defendant that an attack of Menieré's disease (a disease of the internal ear), caused her illness and perforated ear drums.

His expert witness, Dr. McJ. Allen, who examined plaintiff November 24, 1925, at Dr. Patten's office on behalf of and at the request of defendant's counsel, and in the presence of her then attending physician, Dr. Patten, testified that "I formed a conclusion that the cause of the condition of the drum of her ears was probably acute otitis media, early childhood, possibly later in life, probably early childhood" (R. 32-33) and that it was due probably to poor ventilation of the

nose and focal infection, most probably the teeth, and that the rupture of the ear drums would result in such a case because as a result of the inflamation an abscess forms and ruptures through the drum, through which the pus finally ruptures. (R. 33) The history of plaintiff's physical condition from childhood, however, as testified to by numerous witnesses, proved that she never had abscessed or running ears or any deafness whatsoever prior to the injury inflicted by the defendant in this case. (R. 15-18.) Moreover, on cross-examination, Dr. McJ. Allen testified that otitis media is a disease of the middle ear (R. 36) and not of the internal ear as is Menieré's disease. Asked if from his examination and history of the case her condition in his opinion was due to Menieré's disease, he answered, "I did not say that. I do not believe I said that." (R. 40-41.)

Miss Spitzer, referred to in the dissenting opinion as a "disinterested witness", was contradicted in various important particulars. She claimed that she was in the defendant's office on October 20th and offered a receipt from the doctor which she says she obtained on that date, and which was so dated. Assuming that she was there on that date, the plaintiff's testimony, corroborated by numerous witnesses who had occasion to remember the date in connection with birthdays in their immediate families, was to the effect that plaintiff was injured on Wednesday, October 25th, five days later. Miss Spitzer does not claim she ever saw the plaintiff except on the one occasion at the doctor's office, until confronted in court nearly five years later and admitted that the occurrence was never called to her attention from 1922 until years later (R. 42); that she was a friend of Mr. and Mrs. Gunning

as well as a patient and knew them very well for sixteen or seventeen years, and saw them frequently. (R. 42) She could not remember how many times or whom she had seen in his office on other occasions, but remembered that on that occasion she had paid the doctor $50. and taken his receipt for that amount, but when shown the receipt she herself had produced it was for $14. instead of $50. and she attempted to explain this by saying "I have one for $50. I thought probably that was it. I don't know how much he charged me for a treatment or visit." (R. 42)

She further testified that the plaintiff was in the doctor's private office only about fifteen minutes, and that no one came into the office while she was there; that she heard no screams and that she saw plaintiff come out of the doctor's room and be assisted into the doctor's bedroom by the doctor. (R. 42)

As to this important fact she was flatly contradicted by plaintiff's witness Brooks C. Easterling, sergeant of the United States Marine Corps, who testified that he had an appointment to meet plaintiff at six or six-thirty p.m. in front of the doctor's office on the day of her injury; that he waited 15 or 20 minutes beyond the time and when she did not come out he went in and then testified:

> "As I got to the door of the doctor's office I heard a scream and at the same time someone came and opened the door and the doctor came to the door and asked me if I was the one that was there for this lady. I told him I was, so he invited me in and I went into his office, where she was lying on a couch, apparently in a semiconscious condition. I asked her what the trouble was and she did not seem to understand me and I asked the doctor what was the trouble, or what

he had done to make that effect, and he said, nothing, that he had just given her a small treatment of oil and she had suffered a slight shock and would be alright shortly. About ten minutes later I asked her how she felt and the only answer I got was "My head, my head.' She remained on the couch possibly an hour when I suggested she be taken off the couch and placed in a more comfortable place and she was taken over to the doctor's bedroom and placed in bed. She was helpless. She had to be picked up bodily. I picked her up, carried her over and placed her in the bed and she was still groaning and moaning with her head; she could not balance herself, she could not walk. She remained there until about 11 o'clock that night, was not much better and was still unable to walk, so I called a taxi, picked her up, carried her down to the taxi and took her home. She was helpless when we got her home. She was taken out of the taxi into the house by the chauffeur, who carried her, and she was placed in bed. I think I have seen her once since then, with the exception of the time that I saw her in her attorney's office. I met her on the street once. She was complaining of her ears, of being deaf in one ear."

Sergeant Easterling was not impeached in any way and was certainly a more disinterested witness than the witness Spitzer and he testified that he had carried the plaintiff bodily from the doctor's office to the doctor's bedroom; yet the witness Spitzer testified that she saw the plaintiff walk assisted by the doctor from the office to the bedroom. This also flatly contradicted the doctor's wife, Mrs. Gunning, who testified that "when she came out of the office she walked to the bedroom." (R. 45)

Defendant argues that plaintiff's expert, Dr. Gill,

testified that he had reached no conclusion as to the cause of her trouble, even assuming that the facts in the hypothetical question were true and considering all the knowledge that he had gained from his examination, but this assertion is contrary to the record and the trial court's understanding of the testimony.

The witness testified, "I understand the question to ask if he made a diagnosis of the cause of her trouble (at the time of his examination); he has not reached a conclusion in his own mind yet." (R. 28) In answering the hypothetical question, he assumed that in October, 1922, no focus of infection here discussed then existed. (R. 29)

The trial court in overruling the motion to strike out the doctor's testimony on this ground said, "With respect to the last stated ground, not having formed any conclusions in his own mind as to the cause, I understand his testimony to be that he had not formed any conclusions in his own mind as the result of his examination; that opinion is expressed in the answer to the hypothetical question which was an opinion based entirely upon facts that he was asked to assume in that question."

In the majority opinion in the Court of Appeals in disposing of the same objection, the court said, "The evidence furthermore tends to show that in February, 1927, plaintiff's ears were examined by a specialist who found that the ear drum of the right ear was practically all gone and that of the left ear from one-third to one-half gone, and that the tissues were scarred. The specialist testified that various diseases or injuries might cause such a condition, or that it might be caused by the injection of some destructive substance into the ears, and that he was unable to state

from his examination the cause of plaintiff's condition, but in answer to a hypothetical question based upon his examination together with the evidence submitted on behalf of plaintiff he gave his opinion as follows: "Why, she had to have something in there to destroy the ear drums. They were destroyed. My opinion is that they were destroyed by something that was put in the ear."

It is therefore quite evident that plaintiff's expert as shown by the record did not testify that, "in the light of all the facts before him and assumed by him as hereinbefore shown" he was unable to reach a conclusion as to the cause of her injury, but he testified that assuming the facts in the hypothetical question to be true and taking those assumed facts together with his own examination, his opinion was that the ear drums "were destroyed by something that was put in the ear." (R. 26)

Nor was the jury, as argued by counsel for the defendant, required to guess or base their conclusion on speculation, because if they believed Dr. Gill's testimony as to his examination and believed the facts to be true that were shown by the testimony of the other witnesses as to her previous healthy and normal condition, which facts were assumed by Dr. Gill in answering the hypothetical question, then the jury had the testimony before it that her ear drums must have been burned by a tissue-destroying acid, the exact nature of which could only have been known to the defendant.

With respect to the argument commencing on page 36 of defendant's brief that all expert witnesses said there were many causes for the perforation of an ear

drum other than those claimed by the plaintiff, yet, the fact remains that every other possible cause was negatived by the testimony of plaintiff's witnesses, because if the perforated ear drums had resulted from any other cause than the acid, namely, from disease or infection it could only have been because an abscess had formed and broken, rupturing the ear drums and discharging pus through the ear. The plaintiff and her witnesses all offered testimony which disproved that she had ever had such a condition. Consequently, the defendant is arguing in disregard of the evidence, the weight and credibility of which was essentially for the jury.

Defendant contended that if an acid had been put in her ear it would have scarred the external canals, but the evidence disclosed that if the dropper had been inserted in the ear far enough, the acid would not have touched the outer canal but would only have burned the drum as in this case. "If a dropper is inserted into the ear far enough, until it is about to touch the drum, and strikes the drum and none of the acid strikes the parts before you get to the drum, it would not cause any burn to the outer canal." (R. 29)

Can it be successfully contended that the court and not the jury should have determined the issues when the testimony offered by the plaintiff tended to establish that plaintiff had never had a diseased or abscessed ear or any deafness, that immediately when the liquid was inserted in her ears, she suffered the sensations and was in the physical condition described by her witnesses, that for four years thereafter, she continuously had medical treatment to relieve this ailment,

and that according to expert testimony, if it were true as testified by her witnesses, that she had no prior infection or disease that had abscessed and ruptured her ear drums and she experienced the sensations described by her immediately following the insertion of the liquid in her ears, then the condition of her ear drums was the result of something that was put in the ear that destroyed the ear drums? (R. 26-75)

The opinion of Mr. Justice Van Orsdel, in which he criticises but adopts the established principle by which issues of fact should be submitted to the jury, does not lessen the fact that in his judgment there was "sufficient evidence to carry this case to the jury."

While it is not incumbent upon counsel to argue for or against any modification in this well established principle, it would certainly tend to oust a jury from its proper judicial function to that of "a mere automaton" to adopt a rule whereby the trial justice, who believes there is a substantial conflict as to substantial issues, is still left the broad discretion to decide whether the evidence raises a "reasonable" issue of fact.

The trial judge has his function of reviewing the verdict and setting it aside if upon due reflection he feels that it is contrary to the evidence or not supported thereby, and in this case the trial court made that review upon his consideration of the motion for a new trial that was filed herein, and with full knowledge of all of the testimony and having had the opportunity to observe the actual trial and to see and hear the witnesses as they testified, he sustained the verdict and sustained his original ruling in submitting the case to the jury.

It would be a dangerous precedent, striking at the very foundation of the jury system, if these well settled principles of law are to be uprooted. This court has uniformly held that the determination of the jury, approved by the trial court and by the Circuit Court of Appeals respecting negligence, if there is any evidence upon which it can be raised, cannot be disturbed by the Supreme Court.

As this court said in the case of Davidson Steamship Company, U. S. 205 U. S. 192, 195; 51 L. Ed. 767: "We could not set aside the verdict of the jury approved as it was by the trial court and the Court of Appeals without ourselves exercising the function of the triers of fact when under the law, such questions are committed to the determination of a jury."

The well defined duties of the court and jury respectively, do not require the citation of authorities nor is there reason to dispute the principles announced in the cases cited by defendant on this question, but the application of those principles to the facts of this case show that this was a jury question.

The mere fact that a Justice of the Court of Appeals would have reached a different conclusion upon the same state of facts and would have given more credence to the testimony of some witnesses and less credence to witnesses that the jury, who saw them, believed, is no reason in law or logic for disturbing the verdict, if we are to be guided by legal principles. Indeed a grave injustice would be done in this case to the plaintiff if the rule were otherwise.

As this Court said in the case of Hickman vs. Jones, 9 Wall. 197, 201; 19 Law Ed. 553:

> "In this case the evidence was received without objection, and was before the jury. It tended

to maintain, on the part of the plaintiff, the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it in full effect. But its application to the facts—and the facts themselves—it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has approved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law."

Texas and P. R. Co. vs. Gentry, 163 U. S. 353; 41 Law Ed. 350.

R. R. Co. vs. Ives, 144 U. S. 408; 36 Law Ed. 485.

Texas and P. R. Co. vs. Carlin, 189 U. S. 354; 47 Law Ed. 849.

Maraude vs. Texas & P. R. Co., 184 U. S. 173, 183; 46 Law Ed. 487.

Charter Oak Ins. Co. vs. Rodel, 95 U. S. 232; 24 Law Ed. 433.

Barney vs. Scheimer, 9 Wall 248, 19 Law Ed. 648.

New Jersey R. Co. vs. Pollard, 22 Wall 341; 22 Law Ed. 877.

Moulor vs. American Life Ins. Co., 101 U. S. 708; 25 Law Ed. 1077.

Weightman vs. Washington, 1 Black 39; 17 Law Ed. 52.

Richardson vs. Boston, 19 How. 263; 15 Law Ed. 639.

CONCLUSION.

A careful consideration of the complete record of testimony in this case will establish that the issues of fact were peculiarly within the province of the jury and were submitted to the jury under correct and fair instructions as to the law, that no error was committed in the trial of this case, and that the judgment should be affirmed.

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